

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

MORTON GROVE PHARMACEUTICALS, INC.,)	
)	
Plaintiff,)	No.: 08-CV-1384
)	
v.)	Judge Bucklo
)	Magistrate Judge Mason
THE NATIONAL PEDICULOSIS)	
ASSOCIATION, INC.,)	JURY TRIAL DEMANDED
)	
Defendant.)	
)	

**MOTION FOR LEAVE TO FILE INSTANTER SUR-REPLY TO MORTON GROVE
PHARMACEUTICALS, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS
THE NATIONAL PEDICULOSIS ASSOCIATION, INC.'S COUNTERCLAIM**

The National Pediculosis Association, Inc. (“NPA”) hereby moves this Court for leave *instanter* to file a sur-reply to Morton Grove Pharmaceuticals, Inc.’s (“Morton Grove”) Reply in Support of Its Motion to Dismiss NPA’s Counterclaim. In support of this motion, NPA states as follows:

1. NPA regrets burdening the Court with yet more briefing regarding Morton Grove’s motion to dismiss NPA’s counterclaim, and ordinarily NPA would not seek leave to file a sur-reply even though Morton Grove’s reply contains numerous misstatements of law and fact and also contains quite a number of arguments that Morton Grove only raised for the first time in its reply. However, one of Morton Grove’s new assertions is so egregiously misleading that NPA has no choice but to alert the Court to this issue.

2. In its reply brief, Morton Grove asserts for the first time that “the FDA itself has not found www.lindane.com to be a commercial advertisement. (Ex. A, Ltr. from D. Beers to FDA, which the FDA apparently accepted.).” (MG Reply at 6.) Whether lindane.com is a

commercial advertisement is a key factual issue, which Morton Grove's motion to dismiss NPA's Lanham Act claim asks this Court to resolve as a matter of law.

3. Morton Grove's assertion is directly contrary to the sworn deposition testimony of Ralph Hodosh, who is Morton Grove's director of regulatory affairs. Mr. Hodosh testified that the FDA was still in the process of evaluating Morton Grove's arguments and had not yet determined whether lindane.com contained commercial advertisements for the products at issue. This testimony is attached to the sur-reply as Exhibit 1.

4. Given these circumstances, NPA should be permitted to file a short sur-reply addressing this one issue. *See, e.g., Orthoarm, Inc. v. Am. Orthodontics Corp.*, No. 06-C-0532, 2007 WL 172612, at *2 (E.D. Wisc. Jan. 18, 2007) (granting leave to file sur-reply to respond to argument raised for the first time in reply brief); *cf. Holansky v. Prudential Financial*, No. 02 C 4220, 2004 WL 1404016, at *3 (N.D. Ill. June 21, 2004) (crediting statement made in reply brief where party did not seek leave to file a sur-reply to challenge the statement). A copy of NPA's proposed sur-reply is attached to this motion.

WHEREFORE, for the foregoing reasons, NPA respectfully requests leave of Court *instanter* to file the attached sur-reply to Morton Grove's Reply in Support of Its Motion to Dismiss NPA's Counterclaim.

Dated: August 8, 2008

Respectfully submitted,

THE NATIONAL PEDICULOSIS
ASSOCIATION, INC.

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